Supreme Court, U.S.
FILED
NOV 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-548

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's brief in opposition distorts and misstates the applicable law and the controlling facts.

Partly echoing the court below, on the crossover issue, Respondent says that "[t]he continued existence throughout the strike of [parts of] the collective bargaining agreement and [in particular] its union security clause were indeed relevant considerations forming a part of the basis for the Eighth Circuit's finding of discrimination." (Resp. 7)[1]

But whether the union security clause remained in effect during and after the strike is at issue in the prior case between the same parties in which this Court has granted certiorari. (No. 86-1650) The decision below, therefore, cannot be allowed to go unreviewed when the case which the Eighth Circuit regarded as its "most important[ ]" underpinning (7a) is itself under review by this Court.

Standing alone, moreover, on both the crossover and trainee issues, this case clearly presents the required independent and compelling reasons for review stated in the petition. The force of those reasons is undiminished by Respondent's misconceptions and misinterpretations of the law.

ARGUMENT

I. The Applicable Law Misconceived

1. Underlying Respondent's position is the unqualified premise that "economic strikers are entitled to reinstatement to their former jobs upon their unconditional offer to return to work." (Resp. 4) The "basic principle articulated by this Court in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967)" ("*Fleetwood Trailer*") (Resp. 4), however, is that upon their

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1 Respondent's brief in opposition to the petition is referred to as "Resp. _____." The petition is referred to as "Pet. _____"; and the appendices to the petition as "_____a."

unconditional offer to return to work, economic strikers are entitled to fill their former jobs, *if vacant*, or other *vacant* positions for which they are qualified. In *Fleetwood Trailer*, where many of the positions were filled during the strike by crossovers who remained in those jobs after the strike,[2] the Court held that a striker "is entitled to an offer of reinstatement" only "[i]f and when a job for which the striker is qualified becomes available. . . ." 389 U.S. at 381. It is the rule, not the "exception" (Resp. 4), that all "those who worked during the strike" may retain their jobs. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 232 (1963) (*"Erie Resistor"*).

2. Respondent's repeated emphasis (Resp. 5-7) on the word "replacement" to suggest that this Court did not intend it to include crossovers as well as new hires (*but see* Pet. 14) completely ignores the underlying rationale of the decisions in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) (*"Mackay Radio"), Erie Resistor* and *Fleetwood Trailer*. The reason that an employer may retain " 'those who worked during the strike' " (Pet. 14) is to assure that the employer may exercise its right to operate during a strike; that reason applies to crossovers as well as to new hires. The Court that authorized the retention of new hires (with days or weeks of service) cannot have thought it "divisive" (Resp. 7) for an employer to retain crossovers (with years of service).

3. The third major faulty legal premise underlying both the decision below and Respondent's position is that strikers are entitled to be reinstated in seniority order. Neither the Eighth Circuit nor Respondent even attempts to explain the basis of this assumption. Whatever the status of the TWA-IFFA 1981-84 contract, the district court explicitly found that it "does not authorize the exercise of seniority rights to obtain reinstatement after a strike." (22a) Nor is there a back-to-work agree-

2 389 U.S. at 376; *see also* the Ninth Circuit's decision in *NLRB v. Fleetwood Trailer Co.*, 366 F.2d 126, 127 (9th Cir. 1966), where the court stated: "Approximately one-half of respondent's employees either did not go on strike, or crossed the picket lines to return to work within a few days."

ment giving the strikers that right. Absent some agreement giving the strikers a right to reinstatement in seniority order, they have no such right. *See Mackay Radio*, 304 U.S. at 347; *NLRB v. American Olean Tile Co.*, 826 F.2d 1496, 1500-01 (6th Cir. 1987) (*"American Olean Tile"*); Pet. 17 and n.16.

4. Respondent, moreover, never explains how the postulated continued existence of the union security clause affects the right of the crossovers to keep their jobs. Nor does it explain how the alleged "discrimination" between the crossovers and full-term strikers[3] "is just as invidious and with the same long-term divisive effects as that which was condemned by this Court in *Erie Resistor*." (Resp. 7-8; footnote omitted)[4] In *Erie Resistor*, it was the promise of continued preference for the crossovers and replacements after the full-term strikers rejoined the active workforce, by filling vacancies, that this Court found so invidious and divisive. (*See* Pet. 27-28 and n.27) Here, on the other hand, as in *Mackay Radio*, the crossovers are not given any preference over reinstated full-term strikers.

3 Rather than discriminating, as noted at pages 1-2 above, TWA applied, and had to apply, the same general principle enunciated by this Court to both the crossovers and the full-term strikers: reinstatement, upon the economic striker's unconditional offer to return to work, if and when a job for which the striker is qualified becomes available. *See American Olean Tile*, 826 F.2d at 1501-02.

4 Purporting to explain why the new hires, all of whom would have less seniority than the full-term strikers, need not relinquish their jobs at the end of the strike, the Eighth Circuit stated that since the "[n]ew hires . . . were not union members when they began work during the strike," they "cannot be the subject of discrimination based upon union loyalty and activity." (7a n.4) To the extent the union security clause continued, however, the new hires were subject to it within 60 days of the start of their employment. Since more than 60 days passed between the time many of the new hires began their employment and the time the strike ended, there would have been no difference at the relevant time (*i.e.*, when the full-term strikers offered to return to work) between those new hires and the crossovers with respect to union membership or the compulsory payment of dues; neither would have to be union members (*see* Pet. 26-27 and n. 26), and both would have to pay union dues.

5. *Erie Resistor* does not establish the principle that an employer may not "implement any policy which would adversely affect employees' job security, job selection, or other benefits because of their participation in a strike" (Resp. 4), nor did TWA implement such a policy. *Erie Resistor* holds only that, *after reinstatement*, strikers cannot be disadvantaged *vis-a-vis* those who worked during the strike. It does not say anything about job security, in the sense that Respondent would have it here, that strikers are entitled to replace those permanent employees who worked during the strike.

6. Rather than not "material," as Respondent says (Resp. 2), the conflict, on the crossover issue, between the Eighth and Sixth and Seventh Circuits is of the essence. Respondent's statement about *NLRB v. Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985) (Resp. 10), ignores its holding about the rights of earlier returning crossovers as against more senior but later returning crossovers. In that case, an employee's place on the active seniority list determined whether he worked or not. The court held that crossovers reemployed in vacancies while the strike was on could not displace, on that list, new hires or other crossovers with less pre-strike seniority who had returned to work before them. *A fortiori*, full-term strikers would have no right to displace "junior" crossovers. Similarly, in *NLRB v. American Olean Tile Co.*, 826 F.2d 1496 (6th Cir. 1987), not only all the members of the court but also the union's attorney agreed that it was lawful for the employer to reinstate crossovers during a strike in the chronological order in which they offered to return to work, and to retain them, regardless of seniority. And in *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926 (7th Cir. 1982), "junior" crossovers retained their jobs as against the claims of more senior unreinstated strikers. (*See* Pet. 16-17.)

7. In holding that the flight attendants in training were not employees within the meaning of the Railway Labor Act, 45

U.S.C. §§ 151 *et seq.* ("RLA" or "the Act"),[5] the Eighth Circuit found "dispositive" the Seventh Circuit's decision with respect to the employment status of "the Group of 500" in *ALPA v. United Air Lines*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987) ("*United Air Lines*"). (10a-12a; Resp. 11) Respondent brushes aside the crucial factual differences between "the Group of 500" and the flight attendants in training by noting that the court below considered the differences "irrelevant" and then endorses the court's reliance on its consequent misreading of the Seventh Circuit's decision as a "sound and reasonable interpretation of [the] Act." (Resp. 11) The Seventh Circuit, however, simply did not hold that pilots in the same employment relationship to United as the flight attendant trainees here were to TWA (*see* Pet. 18 and n.17) were not "employees" under the RLA.

8. Although the National Mediation Board ("NMB"), the agency with primary jurisdiction to interpret and administer the RLA, has found that the differences which the Eighth Circuit held irrelevant were in fact determinative of employee status,[6] Respondent contends that NMB decisions in representation disputes cannot be relied on in determining who is an

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5 That novel theory was not briefed in either court below. Respondent did argue that the trainees were not *flight attendant* employees because they had not concluded the training necessary to be flight attendants (*but see* Pet. 19-20 and n.20); it never claimed that they were not employees at all. In fact, the parties stipulated that "[i]ndividuals who began training on and after March 10, 1986 at the TWTC *were hired as TWA employees* on their first day of training." (Stip. 21 at 60a; emphasis added.)

6 The NMB held that the trainees in *Air Micronesia*, 10 N.M.B. 11 (1982), who (like "the Group of 500") had never been on the payroll of the carrier, were not employees. *Air Micronesia* was relied on by the Seventh Circuit in *United Air Lines* in finding that "the Group of 500" were not employees. On the other hand, the NMB held that the trainees in *Scheduled Skyways*, 10 N.M.B. 488 (1983) (68a), who (like the flight attendants in training in the case at bar) were hired by the carrier and were on the carrier's payroll, were employees within the meaning of the RLA, even though they were still in ground school training at the time in question. *See also* Pet. 18 n.17 as to another group of 539 United Air Lines pilots, held to be permanent replacements and employees.

employee within the meaning of the RLA. (Resp. 12) The short (and dispositive) answer to that contention is that the definition of persons covered by the Act, found in Section 201 of the RLA, 45 U.S.C. § 181, upon which the court below relied, is equally binding on the NMB in determining whether an individual is an *employee* entitled to vote in a representation election. (*See* RLA § 2, Ninth, 45 U.S.C. § 152, Ninth.)[7] While the NMB may allow individuals who clearly were employees within the craft or class and who dispute any change in their status (*e.g.*, who claim they were improperly discharged) to vote, it has not authorized voting by an individual who was never an employee in the appropriate craft or class.

9. Respondent argues additionally that in the past "[t]rainees were never included within the bargaining unit nor covered by any of the collective bargaining agreement terms," and "were not even considered to be 'employees' as defined by the Fair Labor Standards Act" ("FLSA"). (Resp. 12; footnote omitted) But, like "the Group of 500" in *United Air Lines*, there was an explicit agreement between TWA and trainees in the past that they were not employees and they were not paid or otherwise accorded the terms and conditions of employees. In contrast, the flight attendant trainees at issue here were hired and paid and treated as employees. There can be no doubt that if the employees in *Donovan v. Trans World Airlines*, 97 Lab. Cas. (CCH) ¶ 34,385 (W.D. Mo. 1983) (Resp. 1a), had been told they were employees as of the day they started their training and were paid as employees, as were the

7 As the agency charged with "designat[ing] who may participate in [representation] election[s]" under the Act, 45 U.S.C. § 152, Ninth, the NMB's interpretation of the statutuory definition of "employee" is entitled to great deference. *See, e.g., United Air Lines*, 802 F.2d at 912 n.18; *Southern Railway v. Combs*, 484 F.2d 145 (6th Cir. 1973).

flight attendant trainees here, they would have been found to be employees within the meaning of the FLSA.[8]

10. Respondent argues that this Court applied a balancing test in *Mackay Radio* and that the Eighth Circuit's conclusion "that this balance tips in favor of IFFA's position" when applied to the situation of the trainees "is a rational application of the *Mackay* decision." (Resp. 13) But the balancing test in *Mackay Radio* was applied not to determine whether the employees there were entitled to be treated as permanent replacements, but to balance the competing claims of the right to strike and the right of the employer to operate. This Court struck that balance in *Mackay Radio* and no further case-by-case balancing is called for. *See* Pet. 24; *see also Hot Shoppes, Inc.*, 146 N.L.R.B. 802, 805 (1964) (footnotes omitted) ("The Supreme Court's decision in *Mackay Radio & Telegraph Company*, and the cases thereafter, . . . state that an employer has a legal right to replace economic strikers at will").

11. Respondent does not even attempt to address the NLRA precedent, established by the NLRB and other Circuits, under which the trainees here would have been held to be permanent replacements. (*See* Pet. 19-21.) Two lines of decision under the NLRA put the Eighth Circuit in essential conflict, on the trainee issue, with the Second and Seventh Circuits, but Respondent chooses merely to endorse the Eighth Circuit's erroneous statement that "the NLRA case precedent supports the finding that the trainees had not acquired the status of permanent replacements at the time the strike ended." (Resp. 14)

8 The six criteria (listed at Resp. 17a n.25) for determining whether trainees are employees within the meaning of the FLSA are preceded in § 10b11(b) of the Wage and Hour Division Field Operations Handbook by the statement: "If *all* six of the following criteria apply, the trainees or students are not employees within the meaning of the FLSA" (emphasis added). It follows that since criteria 5 and 6 are not satisfied here, the flight attendants in training were employees.

II. The Controlling Facts Misstated

1. Respondent, echoing the Eighth Circuit, persists in the misstatement that TWA "awarded" the crossovers permanent replacement status. The crossovers, however, were permanent employees before the strike began. Those who exercised their right not to join the strike merely continued to work in their permanent positions. As to those who initially joined the strike, petitioner simply applied to them the same basic principle, enunciated by this Court, that it applied later to the full-term strikers: upon their unconditional offer to return to work, economic strikers are entitled to fill their former jobs, if vacant, or other vacant positions for which they are qualified.

2. Throughout its brief, Respondent argues as if all the flight attendant positions (except those filled by new hire permanent replacements) were vacant at the end of the strike and TWA then allocated those vacant positions among a pool consisting of all the pre-strike bargaining unit employees. (Resp. (i)) The reality, however, is that TWA neither reinstated the crossovers nor granted them preference at the end of the strike; TWA simply did not displace them from the positions they held when the strike ended.

3. Alternatively, Respondent says that the full-term strikers had been replaced not by the new hires, but by the crossovers, and that crossovers cannot be "permanent replacements." (Resp. 2) Immediately before the strike ended, however, the workforce consisted of the new hires and the crossovers. Since the crossovers were working with the new hires, obviously the new hires were not then replacing the crossovers. If they had previously replaced crossovers (who were not yet working) then, when the crossovers returned to work, *they* were filling "places left vacant by strikers" (*Mackay Radio*, 304 U.S. at 345), and even under the dubious doctrine of *International Ass'n of Machinists v. J.L. Clark Co.*, 471 F.2d 694 (7th Cir. 1972), they were permanent replacements, entitled to keep their jobs when the strike ended. In any event, when the full-term

strikers offered to return to work, the positions held by the crossovers were not vacant; they were already filled by *permanent* employees.

4. Respondent pejoratively and inaccurately refers to the crossovers as employees who "abandon[ed] a strike that they earlier began, . . . leapfrog[ging] over the backs of their fellow employees and fellow strikers. . . ." (Resp. 9) Employees, however, have a right to refrain from collective activity, and, contrary to Respondent's suggestion that the crossovers voted for this strike (Resp. 9), the record does not establish that IFFA allowed the flight attendants to vote on TWA's final offer before it called the strike. In fact, it is established by the trial transcript in *IFFA v. TWA*, No. 86-6030 (W.D. Mo.) that no such vote was taken. In any event, crossovers who abandon a strike do not assure themselves a job at the end of the strike "at the expense of the more senior full-term strikers" (Resp. 9); on the contrary, they prevent the filling of vacancies by new hires.

5. Respondent's statement that there was a "lack of any visible business need for TWA to place these trainees into working positions . . ." (Resp. 13) was not true at the time they were hired. TWA had to hire permanent replacements in time to meet its operating needs. The training of replacements took a minimum of seventeen days. TWA had no idea when the strike would end. It therefore had to hire the flight attendant trainees at issue as permanent replacements when it did, before May 17, 1986, so that they could fly as part of an FAA minimum crew when the peak season began around June 1. It could not wait until June 1 to hire the replacements and then begin their 17-day training. The Eighth Circuit's statement that TWA "established no business need to put trainees into working positions because all vacant positions could be filled with returning strikers" (14a) misstates the question with the benefit of hindsight. TWA exercised its right to give the new hire trainees assurance of permanent employment at the time they began their training—when the strike was still on-going and

TWA had no way of knowing when it would end—because that was the only way it could be confident that it would have the necessary complement of flight attendants 17 days later. At the conclusion of the strike, TWA merely honored the commitment it had earlier made to the flight attendants—a commitment that *Mackay Radio* says it had the right both to make *and to honor*.[9]

CONCLUSION

The Eighth Circuit's decision with respect both to the status of the crossovers (explicitly based "[m]ost importantly" (7a) on its prior decision now pending full review in this Court) and with respect to flight attendants in training (principally based on reliance on a recent inapplicable decision of the Seventh Circuit, not briefed in this case) distorts basic principles established by this Court, conflicts directly with decisions in other Circuits, contravenes National Mediation Board interpretation of the RLA, and departs from long standing precedent and practice regarding the rights of employees who exercise their right to refrain from concerted activity. The petition should therefore be granted, and the decision below on the two specified issues should be reversed.

Respectfully submitted,

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November 17, 1987

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9 There is no issue of business justification because, as this Court said in *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 504 n.8 (1983), "The refusal to fire permanent replacements because of commitments made to them in the course of an economic strike satisfies the requirement . . . that the employer have a 'legitimate and substantial justification' for his refusal to reinstate strikers." (citation omitted) No such issue, moreover, was before the court. (*See* Pet. 8 n.8)